Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80 - 167

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD WRIGHTING, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY MEMORANDUM

SYLVIA SIMMONS PROZAN
2180 Forest View Avenue
Hillsborough, California 94010
Telephone: (415) 343-3921

Counsel for Petitioner

QUESTION PRESENTED

Whether a petition for certiorari is properly before this Court, when a petitioner has exhausted all state remedies by exercising his discretionary state right to further review by commencing extraordinary writs with the Court of Appeal and the California Supreme Court; and when a petition for certiorari is thereafter filed within ninety days after denial of the extraordinary writ by the California Supreme Court?

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This reply brief is addressed only to the issue of the timeliness of the Petition for Certiorari, and to the jurisdiction of this Court to grant the Petition, which was raised for the first time in the respondent's brief.

A. California Procedures For Appellate And Discretionary Review Were Correctly Followed By Petitioner.

Before petitioning this Court for Certiorari, Petitioner correctly exhausted all state remedies available to him.

Respondent has incorrectly represented California procedure. Although the right to appellate review ends at the level of the Appellate Department of the Superior Court for cases originating in municipal or justice courts, thereafter the appellant has the discretionary right to petition a higher court by means of an extraordinary writ.

The use of the extraordinary writ is not mandatory. However, because the right of discretionary review by higher courts exists, this petitioner followed that course.

According to the California Constitution, Article 6, Section 10:

"The Supreme Court, courts of appeal

> . . . have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."

In Green v. Superior Court (1974) 10 Cal.3d 616, and in East Bay Municipal Utility District v. Appellate Department of Alameda County (1979), 23 Cal.3d 839, both petitioners successfully petitioned higher courts for discretionary extraordinary relief after their rights of appeal had ended at the level of the Superior Court.

East Bay Municipal Utility District originated in the municipal court. After the Appellate Department of Alameda County affirmed the judgment below and petitioner had no further right of appeal, a writ of mandamus was filed in the higher courts, and the Supreme Court of California granted review (certiorari). 23 Cal.3d 839, 841-

842, fn. 3 at 842.

Green v. Superior Court originated in small claims court. Green's rights of appeal ended after a trial de novo in the Superior Court of San Francisco. Thereafter he filed a petition for mandamus or prohibition with the District Court of Appeal. The Court of Appeal denied the writ, and Green subsequently petitioned the California Supreme Court for review (certiorari), which was granted. 10 Cal.3d 616, 621-622, fn. 6 at 622.

Therefore, California state law does permit the discretionary use of the extraordinary writ in cases such as the petitioner's, after the right of appeal has ended at the level of the Superior Court or the Appellate Department of the Superior Court. California Code of Civil Procedure 1086.

The respondent's assertion that the

appellate department of the Superior Court was the court of last resort for the petitioner is clearly flawed.

Green and East Bay Municipal Utility District represent the correct procedure under California law. Neither Whittaker v. Superior Court (1968), 68 Cal.2d 357, Burrus v. Municipal Court (1973), 36 Cal.App.3d 233, nor California Rule of Court 62 (all cited by respondent, at brief, p.5) preclude a petitioner from exercising his right to discretionary review by filing an extraordinary writ after the petitioner's rights of appeal have ended with the Superior Court, or with the Appellate Department of the Superior Court.

In Talley v. California (1960), 362 U.S. 60, petitioner did not elect to exercise his discretionary right. Although this Court granted certiorari, Talley does not prohibit a petitioner from exercising his discretionary remedies.

This petitioner has gone farther than Talley. He has chosen to follow the dicta of Green and East Bay Municipal Utility District by exercising his discretionary right to file extraordinary writs with higher state courts prior to petitioning this Court.

Although technically the petition for an extraordinary writ may be a separate action, in substance the petition constitutes a request for the next highest court to review the decision of the lower court on the same case. It is a continuation of that case, and therefore an extension of the appeal of the same case.

As such, the extraordinary writ constitutes the final step in the process of review by a higher state court.

Green, East Bay Municipal Utility District, and the California Constitution affirm that there are discretionary rights of review by means of the extraordinary

writ. Petitioner was entitled to and did exercise these discretionary rights.

B. The Petition For Certiorari Is Timely.

All of the state procedures were complied with in a timely fashion. The petition for mandamus to the District Court of Appeal was timely filed. After the denial of the Court of Appeal, the petition for hearing to the Supreme Court of California was timely. The Supreme Court of California denied petitioner's petition on May 8, 1980, and the Petition for Certiorari was docketed on August 4, 1980, within ninety days of that date.

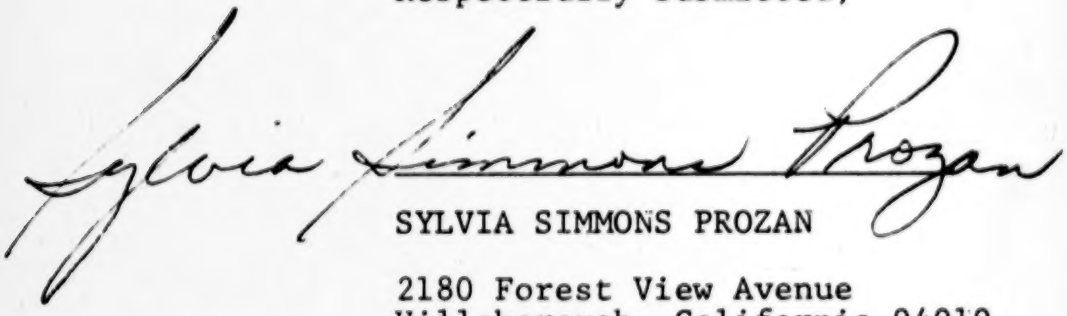
The Petition for Certiorari is, therefore, timely.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, Petitioner respectfully requests that this Court issue its Writ of Certiorari.

November 17, 1980.

Respectfully submitted,



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A P P E N D I X TO PETITIONER'S REPLY MEMORANDUM, PETITION FOR CERTIORARI

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Telephone: (415) 343-3921

Counsel for Petitioner

APPENDIX

CALIFORNIA CONSTITUTION, ARTICLE 6, SECTION 10:

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.***

CALIFORNIA CODE OF CIVIL PROCEDURE 1086: (WRIT OF MANDATE)

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.***